Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-191 OF 1994
SITI NORMA YAAKOB, ABU MANSOR AND DENIS ONG JJCA
8 JULY 1997

Contract *—Damages — Breach — Claim for recovery of balance of purchase price — Vendor deprived of use of balance of the purchase price — Interest on balance of purchase price granted — Whether vendor, in addition to interest granted by the court, entitled to damages for breach*

Companies and Corporations *— Directors — Personal liability — Undertaking by directors to be personally liable for loan — Whether agreement executed by directors would make them personally liable — Whether directors had held themselves out to be personally liable — Whether there was any evidence of undertakings given by directors to assume company's liability under the agreement*

The first to tenth appellants ('the vendors') were the shareholders of a private limited company known as Seri Naga Construction Sdn Bhd ('Seri Naga'). On 3 November 1986, the vendors entered into a sale and purchase agreement ('the agreement') with the first respondent ('Nusantara Timur') for the sale of their entire shareholdings in Seri Naga for a consideration of RM1m. Nusantara Timur made a deposit of RM150,000 towards the purchase price with the balance of RM850,000 to be made on or before 3 December 1986. Nusantara Timur defaulted in their obligation under the agreement. It was alleged that there was a subsequent agreement between the parties that the second and third respondents, who were directors of Nusantara Timur, undertook to assume liability personally for the balance of the purchase price by agreeing to settle the outstanding amount due under a loan taken earlier by one of the appellants. The vendors sued the three respondents for: (i) the RM850,000; (ii) interest from the date of default to date of judgment; (iii) interest on the judgment sum at 8% per annum from the date of judgment to the date of realization; and (iv) damages. The trial judge entered judgment against Nusantara Timur in respect of the first three claims but dismissd the vendors' prayer for damages and the alternative claims by the vendors and the remaining appellants against the second and third respondents for the recovery of the balance of the purchase price of the shares as well as damages for breach of undertakings allegedly given by them. The issue was whether the trial judge's dismissal of prayer for damages and the alternative prayers by all the appellants against the second and third respondents had been correctly made.

Held, dismissing the appeal:

Nusantara Timur had breached the agreement by not paying the balance of the purchase price of RM850,000 within the completion

date. The only damage the vendors could have possibly suffered was being deprived of the use of the balance of the purchase price, which had since been compensated with interest. The additional claims against Nusantara Timur must, therefore, fail. The fact that the agreement was executed by the second and third respondents as directors of Nusantara Timur would not make them personally liable for the purchase price. Further, there was no evidence both oral and documentary to establish that the second and third respondents had held themselves out to be personally liable for the balance of the purchase price. There was also no conclusive evidence of any undertakings, oral or documentary, given by the second and third respondents to assume the first respondent's liability under the agreement. The trial judge had, therefore, made the right decision when he ruled that damages had not been proven against the second and third respondents (see pp 667I, 668A–H, 669G and 670A).

[Bahasa Malaysia summary

Perayu pertama hingga kesepuluh ('penjual') adalah pemegang saham sebuah syarikat persendirian berhad yang dikenali sebagai Seri Naga Construction Sdn Bhd ('Seri Naga'). Pada 3 November 1986, penjual mengikat suatu perjanjian jual beli ('perjanjian tersebut') dengan penentang pertama ('Nusantara Timur') untuk jualan saham pegangan mereka dalam Seri Naga pada balasan sebanyak RM1 juta. Nusantara Timur membuat deposit sebanyak RM150,000 terhadap harga belian dengan baki RM850,000 untuk dibuat sebelum atau pada 3 Disember 1986. Nusantara Timur telah mengingkar dalam obligasi mereka di bawah perjanjian tersebut. Ia dikatakan bahawa terdapat perjanjian yang menyusul perjanjian antara pihak-pihak bahawa penentang kedua dan ketiga, yang merupakan pengarah-pengarah Nusantara Timur, mengakujanji untuk sendiri bertanggungjawab atas baki harga belian dengan bersetuju untuk menjelaskan amaun yang masih terhutang di bawah suatu pinjaman yang diambil terdahulu oleh salah satu daripada perayu. Penjual mendakwa ketiga-tiga penentang untuk: (i) jumlah RM850,000; (ii) faedah dari tarikh ingkar sehingga tarikh penghakiman; (iii) faedah atas tarikh penghakiman pada kadar 8% setahun dari tarikh penghakiman hingga tarikh realisasi; dan (iv) ganti rugi. Hakim perbicaraan memasukkan penghakiman terhadap Nusantara Timur berkenaan dengan tiga tuntutan pertama tetapi menolak permohonan penjual untuk ganti rugi dan tuntutan alternatif oleh penjual dan perayu-perayu yang lain terhadap penentang kedua dan ketiga untuk mendapat balik baki harga belian serta ganti rugi untuk kemungkiran akujanji yang dikatakan diberikan oleh mereka. Isu adalah sama ada penolakan hakim perbicaraan untuk permohonan ganti rugi dan permohonan alternatif oleh kesemua perayu terhadap penentang kedua dan ketiga telah dibuat dengan betul.

Diputuskan, menolak rayuan:

Nusantara Timur telah melanggar perjanjian tersebut dengan tidak membayar baki harga belian sebanyak RM850,000 dalam tempoh

tarikh penyempurnaan. Kerosakan tunggal yang mungkin telah dialami oleh penjual adalah pelucutan penggunaan baki harga belian, yang telah pun dipampas dengan faedah. Dengan itu, tuntutan tambahan terhadap Nusantara Timur mestilah gagal. Fakta bahawa perjanjian tersebut dilaksanakan oleh penentang kedua dan ketiga sebagai pengarah Nusantara Timur tidak akan menjadikan mereka sendiri bertanggungjawab atas harga belian. Selanjutnya, tiada keterangan sama ada secara lisan atau dokumentar bagi menunjukkan bahawa penentang kedua dan ketiga telah mendakwa mereka sendiri yang bertanggungjawab atas baki harga belian. Juga tidak terdapat bukti yang muktamad tentang apa-apa akujanji, sama ada lisan atau dokumentar, yang diberikan oleh penentang kedua dan ketiga bagi menanggung liabiliti penentang pertama di bawah perjanjian tersebut. Oleh itu, hakim perbicaraan telah membuat keputusan yang betul apabila beliau memutuskan bahawa ganti rugi telah tidak dibuktikan terhadap penentang kedua dan ketiga (lihat ms 667I, 668A–H, 669G dan 670A).]

Notes

For cases on damages for breach of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1445–1451.

For cases on personal liability of directors, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 115–116.

Legislation referred to

Companies Act 1965 s 67

Appeal from: Civil Suit No S6–22–112 of 1990 (High Court, Kuala Lumpur)

S Periasamy (*Charanjit Singh Saini* with him) (*Radzi Sheikh Ahmad Peri & Saini*) for the appellants.

Wong Kim Fatt (*Gulam & Wong*) for the respondents.

Cur Adv Vult

Siti Norma Yaakob JCA (delivering the judgment of the court): To appreciate the nature of this appeal, we need to go into some details as to the transactions undertaken by the many parties to this suit as a clear understanding of them would undo some of the confusion created by the mere reading of the appeal records themselves.

The first to tenth appellants (plaintiffs in the court below) were the shareholders of a private limited company known as Seri Naga Construction Sdn Bhd ('Seri Naga'), a property development company, incorporated under the Companies Act 1965 with an authorized capital of RM1m divided into 1m ordinary shares at RM1 each. Between them, the first to tenth appellants were the registered and beneficial owners of 700,001 shares of RM1 each in Seri Naga which also represent the paid up capital of the company. Between these ten shareholders, the tenth appellant was

the majority shareholder holding more than 50% of Seri Naga's equity. Additionally, the first and second appellants were also the directors of Seri Naga and Seri Naga's known asset at the material time was a piece of land known as Lot 10, Grant No 19811, Town of Ayer Hitam, District of Batu Pahat, State of Johor ('the property'). A

On 3 November 1986, the first to tenth appellants ('the vendors'), entered into a sale and purchase agreement ('the agreement'), with the first respondent company (Nusantara Timur, a defendant in the court below) for the sale of their entire shareholdings of 700,001 shares in Seri Naga to Nusantara Timur for a consideration of RM1m. This was in effect a takeover of Seri Naga by Nusantara Timur. B

The second respondent and his son, the third respondent (both defendants in the court below) were the directors of Nusantara Timur which had a paid up capital of RM250,000 and the sole shareholder of Nusantara Timur was Low Nam Hui & Sons Sdn Bhd ('the family company') owned and controlled by the second respondent. C

It is not disputed that under the agreement, Nusantara Timur made a deposit of RM150,000 towards the purchase price with the balance of RM850,000 to be made within 60 days after the date of the agreement, ie on or before 3 December 1986. D

Under preamble (ix) of the agreement, the purchase would be completed with Nusantara Timur obtaining a loan to settle the balance of the purchase price. That same undertaking is reconfirmed by cl 2.2.2 of the agreement. Despite attempts made by the second and third respondents to settle the balance, the details of which appear subsequently in this judgment, Nusantara Timur defaulted in their obligation and for this breach they are sued by the vendors for the following reliefs: E

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(1) Judgment for RM850,000, this being the balance of the purchase price due under the agreement.

(2) Interest thereon from 4 January 1987, the date of default to date of judgment.

(3) Interest on the judgment sum at 8% per annum from the date of judgment to the date of realization. G

(4) Damages.

That takes care of the vendors' cause of action in so far as Nusantara Timur is concerned and that is clearly averred to in paras 20 and 21 of the statement of claim. In the court below, the vendors succeeded with part of their claim and the learned trial judge entered judgment against Nusantara Timur in terms of (1)–(3), fixed the pre-judgment interest at 5% per annum and costs. There is no appeal against this part of the trial judge's decision. H

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The trial judge however dismissed the vendors' prayer for damages against Nusantara Timur and likewise the alternative claims by the vendors and the remaining appellants against the second and third respondents for the recovery of the balance of the purchase price of the shares as well as

damages for breach of undertakings allegedly given by them. It is to appeal against the orders of dismissal that we were concerned with in this appeal.

We must confess that we found great difficulty in appreciating the claims against the second and third respondents from a perusal of the statement of claim itself as they have not been clearly pleaded.

To begin with, such claims are pleaded in the alternative and the basis of such claims are set out in paras 22–24 and 27 of the statement of claim. Paragraphs 25, 27 and 30 then set out the particulars identifying the cause of action against the second and third respondents.

The undisputed particulars show that the 11th appellant (also a plaintiff in the court below) had obtained a term loan of RM850,000 ('the Madon loan') from a finance company, Kewangan Usaha Bersatu Bhd ('KUBB'). Security over the Madon loan was provided by:

(1) a third party legal charge over the property, being Presentation No 17021/80, Jilid 1497, Folio 15;

(2) the personal guarantees of the 12th and 13th appellants (plaintiffs in the court below) who were the directors and shareholders of the 11th appellant at the material time; and

(3) the corporate guarantee of the 14th appellant (also a plaintiff in the court below).

Apart from these particulars, it is not too clear from the appeal records when this Madon loan was approved or the purpose why the liability was incurred. However, from preamble (vi) of the agreement, it is clear that the Madon loan was already in existence when the agreement was executed on 3 November 1986.

With the Madon loan in place, and despite the fact that Nusantara Timur was still indebted to the vendors for the balance of the purchase price of the shares, the entire shareholdings of Seri Naga were nevertheless transferred within ten days of the execution of the agreement and subsequently registered in the name of Nusantara Timur. The second and third respondents replaced the first and second appellants as the new directors of Seri Naga and the new directors took over the management and control of that company.

These events were allowed to happen following the trust and the good relationship enjoyed by the vendors with the second and third respondents. This was so as apart from the takeover of Seri Naga by the second and third respondents through Nusantara Timur, there was also the takeover of another company known as Maza Development Sdn Bhd by the second and third respondents. The consideration for Maza Development had been settled in full and based on this and undertakings allegedly given by the second and third respondents, the vendors readily transferred the control and management of Seri Naga to the second and third respondents without waiting for the sale of the shares to be completed. The alleged undertakings were that the second and third respondents would assume liability for the balance of the purchase price by paying the amount directly due to KUBB, redeem the property and discharge the

12th-14th appellants of their liabilities under the guarantees they had given to KUBB for the Madon loan. The second and third respondents would assume such liabilities personally. A

Before us, Mr S Periasamy, learned counsel for the appellants, was heard to explain that the second and third respondents had agreed both orally and in writing to settle the Madon loan directly with KUBB, the principal sum of which was also the same as the balance of the purchase price for the shares, and to treat such payment as completing the purchase of the shares. B

It would appear that there was some sort of a contra arrangement by which settlement of the Madon loan by the second and third respondents would also settle the outstanding amount due under the agreement. From this, we can only conclude that the vendors may well have intended to utilize part of the proceeds of sale of the Seri Naga shares to settle the Madon loan. C

In any event, pursuant to these rather unusual arrangements, Seri Naga (and not Nusantara Timur) applied for and was approved a term loan of RM850,000 ('the second loan') by KUBB. KUBB's letter of approval dated 19 March 1987 cites the purpose of the second loan to be applied to off set the Madon loan. For this second loan, the securities were to be provided by: D

(1) a first party first fixed charge over the property. This must of necessity mean that Seri Naga had to redeem the property first before it could be utilized as a security for the second loan; E

(2) the personal guarantees of the second and third respondents. There was this allegation that the new guarantees would substitute the ones executed by the 12th and 13th appellants for the Madon loan; and F

(3) the corporate guarantee of Far East Plywood Bhd which the appellants say would substitute the one executed by the 14th appellant in favour of KUBB.

It is not disputed that KUBB never disbursed the second loan to Seri Naga and the reasons given are that: G

(1) the second and third respondents had failed to execute the relevant documents and pay the necessary stamp duty and other charges; and

(2) in any event, the facility was insufficient to pay off the Madon loan and the accrued interest. H

Quite apart from the above reasons, we consider the second loan to be a transaction caught by s 67 of the Companies Act 1965 as Seri Naga was indirectly providing financial assistance in the purchase of its own shares. KUBB must have entertained its own reservations on the legality of the second loan as expressed by condition 20 in its letter of approval dated 19 March 1987. I

Thus, up to the time when the appellants filed their civil suit against the respondents, the following were not disputed:

(1) The balance of the purchase price of the shares had not been paid.

(2) The second loan never materialised and with it the assumptions of the liability by the respondents for the Madon loan.

(3) The Madon loan still remained due and owing. The only off-setting occurred when KUBB foreclosed the property but the proceeds from the auction of the property were not sufficient to settle the Madon loan in full.

(4) By agreement dated 31 October 1988, Nusantara Timur sold all its shares in Seri Naga to Sutra Development Sdn Bhd for a nominal sum of RM10.

In addition to praying for specific performance of the agreement and damages for its breach, the appellants have also pleaded in the alternative a reversion of their status quo as regards the Seri Naga shares, ie that the respondents effect a transfer of them to the vendors, that the second and third respondents resign as directors of Seri Naga and deliver all documents, books and papers belonging to Seri Naga to the vendors.

Perhaps realizing the hopelessness of their claim to maintain their status quo, the appellants had confined their alternative claims as involving the following two issues in the court below:

(1) whether Nusantara Timur is liable to pay the balance of the purchase price plus interests and costs and damages for breach of the agreement to the vendors;

(2) alternatively, whether the second and third respondents are liable to pay the balance of the purchase price of the shares and damages for breach of their undertakings to assume the liability for the Madon loan and in so doing to treat such payment as payment for the balance of the purchase price of the shares as well.

Before us, arguments were centred upon the following issues:

(1) whether the trial judge's dismissal of the vendors' claim for damages for breach of the agreement against Nusantara Timur had been correctly made;

(2) whether the trial judge's dismissal of the alternative prayers by all the appellants against the second and third respondents:

(a) for the balance of the purchase price of the shares; and

(b) for damages for breach of the undertakings to assume liability for the balance of the purchase price,

had been correctly made.

Taking the first issue, Nusantara Timur's primary obligation as the purchaser of the Seri Naga shares was to complete the sale by the payment of the purchase price under cl 2 of the agreement within the completion date. They had complied with the payment of the deposit of RM150,000 under cl 2.2.1 but not with the balance of the purchase price of RM850,000 within the completion date as specified by cl 2.2.2. Since time was the

essence of the agreement (cl 11.1), clearly Nusantara Timur had breached the agreement. Under cl 8.1, the vendors were entitled to treat the agreement as being null and void and to forfeit the deposit. But the vendors did not elect to do so and neither did they forfeit the deposit. Instead, following the breach, they continued to treat the agreement as still subsisting and binding and this can be seen from the prayer for specific performance pleaded in the statement of claim. They never abandoned their claim to recover the balance of the purchase price, for which they had succeeded in the court below.

Under such circumstances what other possible damages could the vendors have suffered other than being deprived of the use of the balance of the purchase price? That has since been compensated with the payment of interest both for the pre and post-judgment periods. In this respect, we see no reason to disturb the finding of the trial judge that the vendors have already been adequately compensated by the payment of the RM850,000, interests and costs and that the additional claim for damages against Nusantara Timur must fail.

There are two limbs of liability which all the 14 appellants have attached to the second and third respondents. The first is the recovery of the balance of the purchase price under the agreement.

The fact that the agreement was executed by the second and third respondents as directors of Nusantara Timur does not make the second and third respondents personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely Nusantara Timur's, the contracting party. We can do no better than to quote the trial judge's reasoning on this:

> A company incorporated under the Companies Act 1965 has its own separate legal entity, distinct from its members and officers. It can sue and be sued in its own name and, being an artificial person, it can only act through its directors and officers. It enters into an agreement through its directors and authorized officers. A director or an authorized officer of a company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

There is also a finding by the trial judge that there is no evidence both oral and documentary to establish that the second and third respondents had held themselves out to be personally liable for the balance of the purchase price. There is no reason why we should not accept this finding and in any event, Mr Periasamy, learned counsel for the appellants, did not make any submission on this point.

The subsequent arrangements or undertakings relied upon by the appellants against the second and third respondents are founded in a letter dated 22 December 1986, written by third respondent as the deputy managing director of the family company. The letter is addressed to KUBB's solicitors, M/s Ghazali Ariff & Partners wherein there is a statement

to the effect that out of the loan of RM5.1m granted by KUBB, presumably to the family company, or a related family company, part of it representing the balance of the purchase price would be utilized to complete the sale of the shares. This of course did not happen.

If indeed that was the intention expressed in the letter, the obligation to settle the sale, if any, lies with the borrower, be it the family company or a related family company, a separate legal entity as opposed to its directors, the second and third respondents. This is so as the loan of RM5.1m was not granted by KUBB to the second and third respondents personally.

As for reliance of the undertakings given by the second and third respondents to assume liability for the Madon loan and, in so doing, was also effectively undertaking to settle the balance of the purchase price, those undertakings, if any, are only of academic value as the second loan, upon which the undertakings were made, never materialized and, in any event, the granting of the second loan was subject to a number of conditions precedent which were never fulfilled. There is also an admission by the 12th appellant, who testified on behalf of all the other appellants, that no reliance can be placed on the two letters dated 22 December 1986 written by the family company to KUBB's solicitors and KUBB's letter dated 19 March 1987 approving the second loan to Seri Naga, to establish that both the second and third respondents had undertaken to be personally liable for Nusantara Timur's debt of RM850,000.

As for their claim for damages against the second and third respondents, they rely on the breach of the undertakings given by the second and third respondents that they would contra the payment of the balance of the purchase price of the shares by assuming liability for the Madon loan. When the second loan granted by KUBB to Seri Naga to off set the Madon loan was not disbursed, the appellants complained that, as a result, they suffered loss and damage when KUBB auctioned the property and the proceeds were insufficient to settle the Madon loan.

The trial judge found no conclusive evidence of any undertakings oral or documentary given by the second and third respondents to assume the first respondent's liability under the agreement. We entirely agree on this conclusion after carefully perusing the evidence and documentary exhibits.

If anybody who should complain about any loss or damage, it would have to be only the 11th–14th appellants in their capacities as the principal debtor and guarantors of the Madon loan. In this instance KUBB's action in foreclosing and auctioning the property was nothing more than the exercise of a chargee's right to a security following a breach. The fact that losses were suffered by the 11th–14th appellants cannot be attributed to the respondents as whatever arrangements that were agreed upon in settlement of the balance of the purchase price hinged upon the settlement of the Madon loan and since the Madon loan had not been settled through no fault of either the second or the third respondents, they could not be made to answer for any losses, if any, incurred by the 11th–14th appellants.

In this respect, the trial judge made the right decision when he ruled that damages had not been proven against the second and third respondents and there was no need to lift the corporate veil because of the transparency of the many transactions entered into by the parties.

For the reasons given in this judgment, the appeal was dismissed with costs and the deposit was ordered to be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

Reported by David Lai